(2)

No. 90-301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD COFFEE,
Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENT IN OPPOSITION

W. J. McDANIEL
McDANIEL, HALL, CONERLY & LUSK, P.C.
1400 Financial Center
Birmingham, Alabama 35203
(205) 251-8143

WALTER R. BYARS
(Counsel of Record)
STEINER BYARS HASKELL SLAUGHTER YOUNG & JOHNSTON, Professional Association
P. O. Box 668
Montgomery, Alabama 36101
(205) 832-8800

Attorneys for Respondent

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

QUESTION PRESENTED FOR REVIEW

Did the court below, relying on *Ward v. Atlantic Coast Line Railroad Co.*, 362 U.S. 396 (1960), correctly hold, in an action brought under the Federal Employers' Liability Act, that negligence of an independent sidetrack owner in the maintenance of its own sidetrack may not be imputed to the railroad?

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Respondent Seaboard System Railroad, Inc., in accordance with Rule 29.1 of the Supreme Court of the United States, certifies that in addition to the parties listed by Petitioner, the following listed parties may have an interest in the outcome of this case:

1. CSX Corporation (parent of CSX Transportation, Inc., the successor to Seaboard System Railroad, Inc., by corporate merger).

The following non-wholly owned subsidiaries of CSX Transportation, Inc.:

2. The Akron and Barberton Belt Railroad Company
3. The Akron Union Passenger Depot Company
4. Allegheny and Western Railroad Company
5. Augusta and Summerville Railroad Company
6. Central Florida Pipeline Corporation
7. The Central Rail Road Company of South Carolina
8. Central Transfer Railway and Storage Company
9. Charlotte Docks Company
10. Chatham Terminal Company
11. Chicago and Western Indiana Railroad Company
12. Clearfield and Mahonng Railway Company
13. The Cleveland Terminal & Valley Railroad Company
14. Dayton and Michigan Railroad Company
15. Dayton and Union Railroad Company
16. Delaware and Bound Book Railroad Company
17. The Home Avenue Railroad Company
18. The Lakefront Dock and Railroad Terminal Company
19. The Monogahel Railway Company

20. Nicholas, Fayette and Greenbriar Railroad Company
21. Norfolk and Portsmouth Belt Line Railroad Company
22. North Charleston Terminal Company
23. Paducah & Illinois Railroad Company
24. Richmond-Washington Company
25. RF&P Corporation
26. Terminal Railroad Association of St. Louis
27. Trailer Train Company
28. Winston-Salem Southbound Railway Company
29. Woodstock & Blocton Railway Company

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent Seaboard System Railroad, Inc. respectfully urges that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of Alabama dated March 30, 1990, and made final on May 18, 1990.

OPINION BELOW

The opinion of the Alabama Supreme Court has not been published in the official reporter but appears as Appendix A to the Petition.

JURISDICTION

Jurisdiction of this Court to review by writ of certiorari is conferred by 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 45 U.S.C. § 51 are contained in the petition. Although the petition asserts that 45 U.S.C. § 53 and 45 U.S.C. § 54 are involved, issues relating to those statutes were neither considered nor briefed in the court below.

STATEMENT OF THE CASE

Respondent refers to the opinion of the Alabama Supreme Court which appears in petitioner's appendix.

The factual statement in the petition is misleading, inaccurate and varies substantially[1] from the relevant facts of record as found by the court below, which findings are adopted by respondent, as follows:

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[1] Petitioner and his co-workers testified, over objection, that at other times they were unable to work at the sidetrack owned by Morie Sand because of sand piled upon its private sidetrack, and that they had complained of this condition. Respondent's trainmaster testified that no employee of Seaboard complained to him about the sand, and further, that removing sand from the sidetrack did not change the condition of the sand alongside the tracks, the removal of which would be uncovering only other sand — "sand on top of sand." Respondent disputes that "the railroad readily acknowledged the condition and the danger" "repeatedly reported" to it. Moreover, prior conditions of sand accumulating on the track were not the proximate cause of Coffee's accident and injury (which occurred because of an object buried in the sand adjoining the track), and any evidence relating to those prior conditions was irrelevant, prejudicial and due to be excluded upon the objections properly interposed. However irrelevant, piles of sand on the sidetrack rails were but an attempt to bring *Coffee* in factual harmony with *Payne v. Baltimore & Ohio Railroad Co.*, 309 F.2d 546 (6th Cir. 1962), *cert. denied*, 374 U.S. 827 (1963), where a train was derailed by a pile of ashes on the sidetrack rails.

"The evidence showed that Coffee's injury occurred on Morie Sand's property near Brown Sands, Georgia. Morie Sand's property is in an area of fine sand that was described as extending in a five-mile radius around Morie Sand's property. Coffee's injury occurred when he stepped from the train into the sand adjoining Morie Sand's sidetrack. His foot struck a broken piece of a lever called an 'inch bar,' causing his knee to fracture and to tear tendons. The evidence indicated that Morie Sand's employees used inch bars to move railroad cars short distances on the track while loading sand into them, but that Seaboard's employees were not issued and did not use inch bars. Thus, the evidence would support a finding that a Morie Sand employee negligently left the broken piece of inch bar beside the track and that it became buried in sand and proximately caused Coffee's injury.

Based on these facts, the trial court below properly instructed the jury that the railroad had a *non-delegable* duty to provide its employees with a reasonably safe place to work; but erroneously instructed the jury that any negligence of Morie Sand in failing to maintain its own sidetrack, as required by its contract with the railroad, would be *imputed* to the respondent railroad.

The full text of the pertinent jury instruction is shown in the opinion of the Alabama Supreme Court:

"The trial court instructed the jury:

'The defendant [Seaboard] was not a guarantor or insurer of the safety of the place to work. The extent of the defendant's duty was to exercise reasonable care under the circumstances at the time and place in question to provide the plaintiff a reasonably safe place to work.

'Now the railroad does have a non-delegable duty to provide its employees with a safe place to work despite the fact that it may not own, control, or be under a primary

> obligation to maintain premises on which the employee is injured. The railroad is not relieved from liability because such premises are unsafe or because [of] the existence of an unsafe condition brought about through the act of another and without the fault of the railroad. In other words, what I'm saying, if you found that the plaintiff in this case was injured as a result of the negligence on the part of the industry in question, the Jesse Morie Sand company, or some of its employees, then that negligence would be *imputed* to the railroad defendant here.
>
> '. . . .
>
> 'Now, I've already explained to you the relationship between any negligence on the part of Jesse Morie's employees and the railroad by saying that the negligence on the part of those employees, if you found that they were negligent, would be *imputed* to the defendant.' [Emphasis added][2]

"Seaboard objected to these instructions, noting that an extensive charge conference had been held, and reiterating its objections 'on the basis that the negligence is not, as a matter of law, imputed to the railroad.' Seaboard argued:

> 'The duty of the railroad is to provide a safe place to work. However, it is not responsible for the negligence of others. It simply . . . may be evidence that bears on its own negligence. But the negligence of it is not imputed, certainly not imputed to them unless that person, or by some reason the agents of the railroad that is fulfilling an operational activity of the railroad such as switching cars and words to that effect [sic]' "

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[2] The irreparable damage caused by this erroneous jury instruction was exacerbated by petitioner's jury argument emphasizing on more than one occasion that Morie Sand's negligence would be imputed to the respondent railroad.

On appeal, the Alabama Supreme Court relying on this Court's decision in *Ward v. Atlantic Coast Line Railroad Co.*, 362 U.S. 396 (1960) held that Morie Sand was not an agent of respondent Seaboard stating:

> "In maintaining its own sidetrack, Morie Sand was no more an agent of Seaboard than the Turpentine Company was an agent of Atlantic Coast Line in maintaining its own sidetrack." (Petition, A-5 - A-6)

This holding did not fail to recognize the railroad's *non-delegable* duty to provide a safe place to work. It simply followed this Court in holding that an independent sidetrack owner, in the maintenance of its own sidetrack (even under contract with the railroad), was not the "agent" of the respondent railroad within the meaning of § 1 of the FELA[3]; therefore, its negligence, if any, properly could not be imputed to respondent railroad.

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[3] 45 U.S.C. § 51

REASONS FOR DENYING THE WRIT

1. The Alabama Supreme Court properly followed and applied this Court's decision in *Ward*. Not satisfied in proceeding under the theory of *non-delegable* duty of the railroad to provide its employees with a safe place to work, petitioner "gilded the lily" by requesting an improper instruction that any negligence on the part of Morie's employees would be imputed to the railroad. The trial court below erroneously instructed the jury in this regard.

The trial court, at petitioner's insistence, failed to distinguish between the "safe place to work" theory which relates to the direct negligence of the railroad in failing to use reasonable care to furnish a reasonably safe place to work — whether on or beyond its premises;[4] and the separate theory of vicarious liability of the railroad for acts of third persons under the definition of "agents" expanded to include persons engaged by the railroad by contract to conduct "part of the operational activities of the railroad."[5]

Petitioner erroneously attacks the decision of the Alabama Supreme Court as "not only in direct conflict with the decisions of the Federal Appellate Courts, but it flies in the face of the most fundamental precepts of the Federal Employers' Liability Act." This ignores the fact that the Alabama Supreme Court relied upon and quoted at length from this Court's decision in *Ward*, which the court below correctly found to be "on all fours with this case." The quoted principle enunciated in *Ward* was the very basis for the decision of the Alabama Supreme Court.

While this *Coffee* decision in some respects may be inconsistent with the decision of the 6th Circuit in *Payne v. Baltimore &*

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[4] *Shenker v. Baltimore & Ohio R. R. Co.*, 374 U.S. 1 (1963).

[5] *Sinkler v. Missouri Pacific R. R.*, 356 U.S. 326 (1958).

O. R. Co., 309 F.2d 546 (1962), *cert. denied*, 374 U. S. 827 (1963), *Payne* insofar as it deals with imputed negligence of an independent sidetrack owner is in conflict with *Ward*.[6] See *Pyzynski v. Pennsylvania Central T. Co.*, 438 F.Supp. 1044, 1048 (W.D.N.Y. 1977) ("our highest court has ruled otherwise").

2. Petitioner has failed to present any "special or important reasons" for the granting of certiorari and has failed to invoke any of the criteria specified in Supreme Court Rule 10.1;[7] the state court of last resort has decided a federal question, settled by this Court, and specifically followed this Court's decision in *Ward*.

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[6] Actually, *Payne* was decided under the direct negligence theory of *non-delegable* duty to maintain a safe place to work. See *Epling v. M. T. Epling Company*, 435 F.2d 732, 736 (6th Cir. 1970), *cert. denied*, 401 U.S. 963 (limited to certain "safe place to work" cases). That court confused the issue by its unnecessary dictum relating to vicarious liability: "There is ε· ϶le basis in the record to sustain the jury's finding of liability regardless of which of the two theories it may had proceeded under, that of independent negligence or that of *imputed* negligence." And further, "if it [the jury] found liability by virtue of *imputing* the negligence of SUCO to defendant, based on defendant's non-delegable duty regarding safety for its employees, the verdict is sound." 309 F.2d at 549. In *Pyzynski* (438 F.Supp at 1047-49), *Payne* was severly criticized and found to have been "limited by its patron tribunal": "The [*Payne*] decision itself was not unanimous and the denial by the United States Supreme Court of the application for writ of certiorari is of no authorative or precedential value. . . . Putting *Payne* aside — which I do — the 'bottom line' herein is that, unless the performance of an operational activity of the railroad is contractually left to another, there is no room for imputation of the other's negligence to the railroad. . . ." As pointed out in *Pyzynski*, the 6th Circuit through *Payne* and its progeny, in imputing negligence unless "the performance of an operational activity of the railroad is contractually left to another" (438 F.Supp at 1049), simply is erroneously out of step with this Court's decision in *Ward*.

[7] Rule 10.1 (a) is inapplicable.

Petitioner contends that *Ward* "had nothing to do with whether or not the negligence of a third party would be imputed to the railroad" and that confusion between the "operational activities" decisions of federal appellate courts following *Sinkler* and *Shenker* "arises from the decision of this Court in *Ward*. . . ." Neither contention is correct.

This Court in *Ward*, granted certiorari "to consider the issues presented in the light of our decisions in *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326 and *Baker v. Texas & P. R. Co.*, 359 U.S. 227", recognizing that there were two issues for decision: (1) whether the proof required a holding that the sidetrack owner, "in the maintenance of the siding, was the 'agent' of the respondent railroad within the meaning of § 1 of Federal Employers' Liability Act, 45 U.S.C. § 51, as we construed that term in *Sinkler* . . ."[8] and (2) the alternative contention that the trial judge erred in refusing to instruct the jury "as to the factors to be considered by the jury in determining whether the petitioner was an 'employee' of the railroad during the performance of the work within the meaning of the Act."[9] This Court answered the primary contention by holding that the independent sidetrack owner was not the railroad's "agent" within the meaning of the Act, but reversed because the jury instruction did not provide the relevant factors set forth in *Baker* upon which to determine whether petitioner was a railroad "employee". Two issues were presented and decided on their merits; not just the one issue relating to "employee" as urged by petitioner. In *Coffee*, the Alabama Supreme Court followed this Court's ruling on the primary contention in *Ward* — the independent sidetrack owner was not the railroad's "agent" within the meaning of the FELA; accordingly, any negligence of the sidetrack owner could not be *imputed* to the respondent.

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[8] 362 U.S. at 398.

[9] *Id.* at 398-9.

Ward is not confusing and does not create confusion between the "operational activities" decisions of the federal appellate courts. *Ward* is fundamentally sound and embraces the most fundamental precept of the FELA: The FELA makes the employer railroad liable only for those injuries to its employees inflicted by the negligence of its "officers, agents, or employees." 45 U.S.C. § 51; *Sinkler,* 356 U.S. at 328-29. Only where the railroad has delegated, by contract, its "operational activities" to another does the other become an "agent" of the railroad whose negligence vicariously is imputed to the railroad. *Sinkler,* 356 U.S. at 331-32 After consideration of *Sinkler* and its expanded "agency" principle, *Ward* specifically held: "In maintaining it [privately owned siding], we do not see how it can be said under the proofs that the [siding owner] was 'engaged in furthering the operational activities of the respondent' [railroad]." 362 U.S. at 397-98. The railroad there and here had no duty to maintain a private sidetrack; its only duty was not to cause its employees to work there if the sidetrack was not a "safe place to work." Imputation of negligence had no place under the facts in *Ward* and has no place under the facts in *Coffee.*

There is no confusion on the issues of "agency" and imputed negligence except for *Payne* and its progeny within the 6th Circuit, which directly conflict with this Court's decision in *Ward. Ward* is neither overruled nor modified by, nor inconsistent with *Shenker,* or *Hopson v. Texaco,* 383 U.S. 262 (1966). *Shenker* relates solely to the safe place to work direct negligence theory, while *Ward* relates to vicarious liability resulting in imputation of the negligence only of an "agent" of the railroad. *Hopson* involved ill seamen[10] who were injured due to the negligence of a taxicab driver which the shipowner chose to

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[10] *Hopson* was brought under the Jones Act (46 U.S.C. § 688) which incorporates the standards of the FELA rendering an employer liable for the injuries negligently inflicted upon its employees by its "officers, agents or employees." 45 U.S.C. § 51.

carry out its statutory duty to take these seamen to the United States Consul for their return to the United States. Clearly, the cab driver was an "agent" "performing, under contract, operational activities" of the shipowner — the statutory duty to deliver the ill seamen to the Consul to arrange their return to the United States. The *Hopson* facts are clearly distinguishable from those in *Ward*. Likewise, there is no confusion in or caused by *Carney v. Pittsburgh & Lake Erie Railroad Co.*, 316 F.2d 277 (3rd Cir. 1963), *cert. denied*, 375 U.S. 814 (1963) and *Moore v. Chesapeake & Ohio Railway Co.*, 493 F.Supp. 1252 (S.D.W.Va. 1980). As observed in *Thomas v. Grigorescu*, 582 F.Supp. 514 (S.D.N.Y. 1984):

> "In each of these cases, as in *Sinkler*, the negligent party was operating under a contract with the plaintiff's employer. This is a critical feature of liability, for it is the contract which permits a finding that the negligent party was the 'agent' of the employer. In the absence of such a contract, there is no basis for liability under the FELA. *See, e.g. Epling v. M. T. Epling Company*, 435 F.2d 732, 736 (6th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971) . . . ."

In *Carney*, the railroad had a contractual arrangement with the YMCA to provide, at the railroad's expense, room and board for the railroad's employees who are working away from home; and in *Moore*, the railroad had a written contract with a third party to operate a cafeteria on the railroad's premises for use of only railroad employees and their guests. The *Thomas* observation is equally applicable to *Carter v. Union Railroad Co.*, 438 F.2d 208 (3rd Cir. 1971). In *Carter*, a third party, pursuant to a written letter agreement with the railroad, furnished a parking lot for the use of the railroad's employees. In each of these cases, a contract or agreement in writing was present, and based on such contract the courts decided in each case that the third party was "performing, *under contract*, operational activities of [the] employer," and was an "agent" of the railroad under the expanded definition of "agent" in *Sinkler*, 336 U.S. at 331-32.

Not so in *Ward*. Although there was a contractual obligation by the sidetrack owner to maintain its privately owned sidetrack in accordance with the railroad's standards, this Court held that the sidetrack owner was not "performing, under contract, operational activities" of the railroad. This Court held that the sidetrack owner not only was not the "agent" of the railroad as a matter of law, but "we do not think that the proofs presented a jury question whether [the sidetrack owner] was the railroad's 'agent' within the meaning of the [FELA] Act." The Court concluded "we do not see how it can be said under the proofs the [sidetrack owner] was 'engaged in furthering the operational activities of respondent [railroad].' " 362 U.S. at 397-98. Such also is the case in *Coffee*. and the Alabama Supreme Court in *Coffee* correctly followed *Ward* in denying the imputation of the negligence of the sidetrack owner to the railroad under facts which were substantially identical to those in *Ward*. In both *Ward* and *Coffee,* there was no duty on the part of the railroad to maintain the privately owned sidetrack; that was the duty of the sidetrack owner. Therefore, "operational activities" of the railroad were not involved.

3. Petitioner Coffee is not, as erroneously contended, left *without a remedy*. Coffee has a cause of action against respondent Seaboard for failure to perform its *non-delegable* duty to provide Coffee with a safe place to work. If indeed the facts are as petitioner contends, petitioner has an adequate remedy against respondent Seaboard under the FELA.

CONCLUSION

The decision of the Alabama Supreme Court in this case is eminently correct. That Court's analysis and decision were dictated by this Court's decision in *Ward*.

Accordingly, petitioner has failed to advance any reason for the grant of certiorari and, for the foregoing reasons, his petition is due to be and should be denied.

Respectfully submitted,

STEINER BYARS HASKELL
SLAUGHTER YOUNG &
JOHNSTON,
Professional Association
P. O. Box 668
Montgomery, Alabama 36101
(202) 832-8800

By /s/ Walter R. Byars
Counsel of Record for
Respondent

CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies of the foregoing Brief of Respondent in Opposition upon counsel of record for Petitioner by depositing three copies in the United States Mail, first-class postage prepaid, and properly addressed, as follows:

Frank O. Burge, Jr., Esq.
Burge & Wettermark, P.C.
2300 South Trust Tower
Birmingham, Alabama 35203

This 10th day of September, 1990.

/s/ Walter R. Byars
Counsel of Record for Respondent